

¹ Respondent is now known as Big Heart Pet Brands.

improvement (MMI) on August 8, 2014. Therefore, respondent's Motion to Dismiss was granted.

Claimant appeals, arguing good cause exists for an extension of time because, even after she was released at maximum medical improvement on August 8, 2014, claimant continued to investigate facts, gather evidence and schedule a deposition before filing her motion for extension. Claimant asserts neither respondent nor the SALJ described facts showing good cause, or a lack thereof, supporting the dismissal of this case. Therefore, the SALJ's Order should be reversed and remanded for further proceedings.

Respondent contends the SALJ's Order should be affirmed.

FINDINGS OF FACT

Timeline

7/3/12 -- Application for Hearing filed.

7/19/12 -- Application for Preliminary Hearing filed.

7/20/12 -- Preliminary Hearing set for 9/25/12.

8/23/12 -- Application for Preliminary Hearing filed.

9/25/12 -- Preliminary Hearing cancelled.

9/27/12 -- Preliminary Hearing set for 11/9/12.

9/27/12 -- Application for Preliminary Hearing filed.

10/17/12 -- Application for Preliminary Hearing filed.

11/6/12 -- Preliminary Hearing cancelled.

11/7/12 -- Agreed Order for Medical entered.

12/4/12 -- Demand for Compensation filed.

12/6/12 -- Application for Preliminary Hearing filed.

12/21/12 -- Preliminary Hearing set for 2/14/13.

2/12/13 -- Preliminary Hearing cancelled.

2/20/13 -- ALJ Ordered an IME with Dr. Amundson. -- **There is no indication in the administrative file when claimant met with Dr. Amundson and his report is not contained in the file.**

4/17/13 -- Application for Preliminary Hearing filed.

4/24/13 -- Preliminary Hearing set for 6/14/13.

6/4/13 -- Preliminary Hearing cancelled. Notation says no longer pursuing the issues.

6/12/14 -- Appeal changed to inactive status.

8/08/14 -- Claimant reaches MMI.

4/20/15 -- Motion to extend was filed.

4/21/15 -- Respondent filed response to Motion to Extend.

7/16/15 -- Application for Dismissal was filed.

7/21/15 -- Motion Hearing set for 9/22/15.

7/27/15 -- Dr. Amundson's Deposition was set for 11/9/15.

8/26/15 -- The SALJ was appointed

9/22/15 -- Preliminary Hearing was held.

9/22/15 -- Order issued granting respondent's request to dismiss the claim.

10/1/15 -- SALJ Order appealed to the Board.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 523(f) states:

(f)(1) In any claim that has not proceeded to a regular hearing, a settlement hearing, or an agreed award under the workers compensation act within three years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with notice to the claimant's attorney, if the claimant is represented, or to the claimant's last known address. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant

has not reached maximum medical improvement, provided such motion to extend is filed prior to the three year limitation provided for herein. If the claimant cannot establish good cause, the claim shall be dismissed with prejudice by the administrative law judge for lack of prosecution. Such dismissal shall be considered a final disposition at a full hearing on the claim for purposes of employer reimbursement from the fund pursuant to subsection (b) of K.S.A. 44-534a, and amendments thereto.

(2) In any claim which has not proceeded to regular hearing within one year from the date of a preliminary award denying compensability of the claim, the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with notice to the claimant's attorney, if the claimant is represented, or to the claimant's last known address. Unless the claimant can prove a good faith reason for delay, the claim shall be dismissed with prejudice by the administrative law judge. Such dismissal shall be considered a final disposition at a full hearing on the claim for purposes of employer reimbursement from the fund pursuant to subsection (b) of K.S.A. 44-534a, and amendments thereto.

(3) This section shall not affect any future benefits which have been left open upon proper application by an award or settlement.

The Board has visited this issue on many occasions. In *Carillo*,² the Board affirmed the dismissal of a matter where claimant filed an Application for Hearing on April 13, 2009, and filed an Application for Preliminary Hearing on February 29, 2012, but did little otherwise. In *Trotter*,³ the Board affirmed the dismissal of a matter where the Application for Hearing was filed on September 5, 2007, with the matter being placed on inactive status until September 4, 2012, when the Motion for Extension was filed by claimant. Claimant's attorney admitted claimant had reached MMI somewhere in mid-2009. No other action was taken on claimant's behalf before the Motion for Extension was filed.

In *Breedlove*,⁴ the Motion to Dismiss was granted and later affirmed by the Board after the Application for Hearing was filed on June 12, 2009, but the matter did not reach regular hearing, a settlement or agreed award within five years. The claimant in *Breedlove* died of non-work related causes in March 2013. Claimant's Motion for an Extension was not filed until February 25, 2015. Claimant's contention that good cause existed for an extension failed because claimant did not file the motion for extension within the statutory time limit. The claimant in *Breedlove* raised an equitable estoppel argument contending the respondent had a duty to raise the issue of a pending dismissal prior to claimant filing

² *Carillo v. Sabor Latin Bar and Grille*, No. 1,045,179, 2014 WL 5798458 (Kan. WCAB Oct. 24, 2014).

³ *Trotter v. Waste Management, Inc.*, No. 1,036,425, 2013 WL 1876330 (Kan. WCAB Apr. 11, 2013).

⁴ *Breedlove v. Richardson Hauling, Inc.*, No.1,046,084, 2015 WL 5918866 (Kan. WCAB Sept. 21, 2015).

his motion for an extension. No such duty existed and the Board found the claimant failed to show any reliance on the respondent's silence on the dismissal issue.

In *Ramstad*,⁵ the Application for Hearing was filed on March 2, 2012. Claimant was at MMI on October 10, 2012. A Prehearing Settlement Conference was conducted on October 14, 2013, with no activity thereafter. Respondent filed its Application for Dismissal on April 8, 2015, which was granted. The Board affirmed the dismissal after confirming claimant had failed to file a motion for extension. In *Yeubanks*,⁶ claimant's Application for Hearing was filed on June 2, 2008, with a Motion for Extension filed, at the earliest, on June 26, 2013. The Board ruled the dismissal was mandated by the Kansas Legislature, based upon the statutory language of K.S.A. 44-523(f).

In *McAdams*,⁷ the dismissal by the ALJ was reversed by the Board after it was determined the matter had gone to prehearing settlement conference without the claimant being provided proper notice that the dismissal issue was to be heard and decided at that time. Due process demanded the claimant be given notice and a reasonable opportunity to be heard before such a significant decision was made. Even though the Board noted the decision by the ALJ was probably the correct one under the circumstances, claimant's due process rights remained. The dismissal order was vacated and the matter remanded to the ALJ for further proceedings.

This matter presents to the Board an issue not yet addressed by the Board. While a motion to extend has been addressed before, the Board has not been asked to decide whether a claimant has failed to properly prosecute the action. In this instance, claimant's Motion to Extend was filed in a timely manner. In addition, claimant presented numerous examples of action taken by claimant between claimant being found at MMI and the hearing on respondent's Motion to Dismiss. The SALJ did not address whether the matter had been properly prosecuted or whether claimant's actions in that regard were lacking. Here claimant was involved in gathering medical information, scheduling depositions, conferring with healthcare providers and working to prepare the case for the final determination at the Regular Hearing. This is not an instance of the matter being placed on the inactive docket or the matter being allowed to languish for years. While the matter could have been pursued with more vigor, the Board finds claimant has not lacked in her prosecution of this action. Therefore, the dismissal by the SALJ is reversed and the matter remanded for further proceedings consistent with this decision.

⁵ *Ramstad v. U.S.D.* 229, No. 1,059,881, 2015 WL 5462026 (Kan. WCAB Aug. 31, 2015).

⁶ *Yeubanks v. Spears Manufacturing Company*, No., 1,040,438, 2014 WL 2616653 (Kan. WCAB May 12, 2014).

⁷ *McAdams v. Payless Shoesource*, No. 1,033,134, 2014 WL 3886801 (Kan. WCAB July 17, 2014).

CONCLUSIONS

After reviewing the record compiled to date, the Board concludes the Order should be reversed and the matter remanded to the SALJ for proceedings consistent with this decision. Claimant has prosecuted this matter sufficiently to avoid a dismissal under K.S.A. 44-523(f).

DECISION

WHEREFORE, it is the finding, decision and order of the Board that the Order of Special Administrative Law Judge Jerry Shelor dated September 22, 2015, is reversed and the matter remanded for proceedings consistent with this decision.

IT IS SO ORDERED.

Dated this _____ day of December, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Jerry Shelor, Special Administrative Law Judge

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